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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL NEFTALI PEREZ, Defendant and Appellant.	G055223 (Super. Ct. No. 13CF3733) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Daniel Neftali Perez was charged with murder for shooting a rival gang member. In addition, the prosecution alleged appellant committed the crime of street terrorism for engaging in felonious conduct with other members of his gang. (Pen. Code, § 186.22, subd. (a).) In his first trial, the jury deadlocked on the murder charge and convicted appellant of street terrorism. In the second, they convicted him of the lesser included offense of voluntary manslaughter.

His appeal is limited to the validity of his conviction for street terrorism. He contends the conviction is invalid for two reasons: 1) The jury that rendered it did not convict him of any other felony; and 2) there is insufficient evidence he acted with other gang members. However, as we explain below, street terrorism is a stand-alone crime; it does not require a conviction for a separate offense. And, there is substantial evidence appellant acted in conjunction with his gang. We therefore affirm the judgment.

FACTS

Orange Varrio Cypress (OVC) and Varrio Modena Locos (VML) are rival street gangs. On the night of November 22, 2013, appellant, Jose Munoz and other OVC members were at a bar in OVC-territory when they got into an altercation with VML members, including the victim Tommy Ramirez. During the scuffle, Munoz exchanged words with Ramirez while gesturing toward the door. At one point, he also loudly stated, "Fuck that. Someone go get the strap," (slang for a gun). But cooler heads prevailed, and nothing further transpired between the two groups at that time.

Following the incident, Munoz and appellant left the bar together. They were only gone for about 10 minutes, but when they returned, appellant was unable to reenter the bar because he was underage. At the door, he tried to use an I.D. card belonging to his friend Pierre Gonzalez, who was inside the bar, but the bouncer refused to let him in, and for good measure kicked Gonzalez out of the bar as well. Munoz gave Gonzales the keys to his car – a Chevy Trailblazer that was in the parking lot – and he and appellant waited in the vehicle while Munoz reentered the bar.

A short time later, Ramirez and his cohorts Daniel Chomina and Mohammed Tyby left the bar and went across the street to another bar. Once they got there, Chomina realized he left his jacket at the first bar, so they went back to retrieve it. When they reentered the bar, Munoz watched Ramirez closely. He knew appellant was armed because when he picked him up that evening, appellant said he was "packing," and he called appellant to tell him he was going to be leaving the bar soon and to have his car running.

Meanwhile, Ramirez's friends Nico Patillo and Collin Lappin arrived at the bar in Patillo's Toyota Camry. Ramirez had asked them to come and pick him up, and after finding a spot in the parking lot, they called Ramirez to let him know they were there. A few minutes later, Ramirez, Chomina and Tyby exited the bar. Upon seeing the trio, appellant and Gonzalez shined the Trailblazer's headlights on them, thinking they were Munoz and their other friends. When they realized that was not the case, appellant got nervous. He was also a little paranoid because he and Gonzalez had been doing cocaine inside the Trailblazer. Appellant asked Gonzalez if he should "smoke" the men, and Gonzalez replied "it's a bust," meaning no. Nonetheless, Gonzalez saw appellant grab something from the glove box and put it in his pocket. He then exited the Trailblazer and began walking toward Patillo's Camry.

Ramirez had moved some items from the back seat of his car into the trunk and was about to enter the vehicle when someone asked, "You from El Modena gang?" Someone shouted "Modena," and appellant yelled "OVC" and fired five shots at Ramirez from close range. Two of the shots hit Ramirez in the back of the head, and two hit him in the back. He did not survive.

Appellant jumped into the Trailblazer and told Gonzalez to "step on it." As they were driving away, he called Munoz, who was still at the bar. They conversed briefly and then Munoz tried to hide his phone inside the bar. Appellant and Gonzalez

drove to Townsend Street in Santa Ana, where appellant disposed of his gun. Then they met up with Munoz at Gonzalez's house and started drinking heavily.

Two days later, the police arrested appellant, Munoz and Gonzalez. They were charged with murder and street terrorism, along with various gun and gang enhancements. Munoz pleaded guilty to voluntary manslaughter, Gonzalez pleaded guilty to being an accessory after the fact, and they both admitted acting for the benefit of a criminal street gang. At his trial, appellant testified he acted in self-defense: He opened fire at Ramirez because he thought, mistakenly, Ramirez had a gun and was going to shoot him. The jury was unable to reach a verdict on the murder charge, and the court declared a mistrial on that count. They did convict appellant of street terrorism, though, finding he engaged in felonious conduct with other members of his gang.

Following a second trial, the jury acquitted appellant of murder and found him guilty of the lesser included offense of voluntary manslaughter. The jury found not true allegations appellant had acted for the benefit of his gang, but it did find he personally used a firearm. The trial court sentenced him to 21 years in prison, representing 11 years for manslaughter, 10 years for using a gun, and a stayed 3-year term for street terrorism. This appeal followed.

DISCUSSION

The sole issue presented is whether appellant was properly convicted of street terrorism in his first trial. Arguing he was not, appellant claims that, *as a matter of law*, the conviction cannot stand because the jury in that trial did not convict him of any other offense. He also claims that, *as a matter of fact*, there is insufficient evidence he acted with any other gang members in shooting Ramirez. Neither claim is well taken.

The crime of street terrorism is codified in Penal Code section 186.22, subdivision (a), which prohibits gang members from engaging in felonious activity. By its terms, the statute applies if the defendant willfully "promotes, furthers, or assists in . . . felonious criminal conduct by members of [a] gang[.]" (Pen. Code, § 186.22, subd. (a).)

Thus, to prove a violation of the statute, the prosecution must establish the defendant engaged in felonious criminal conduct with at least one other gang member. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132.)

With respect to that offense, the trial court instructed the jury, "Felonious criminal conduct means committing or attempting to commit . . . first-degree murder, second-degree murder or voluntary manslaughter." Because the jury did not *convict* him of any of those offenses, appellant contends it was legally impermissible for the jury to find him guilty of street terrorism. However, as set forth above, the street terrorism statute does not require a separate conviction on the underlying felony; rather, it merely requires proof of "felonious criminal conduct." (Pen. Code, § 186.22, subd. (a).)

This is significant because in interpreting the meaning of a statute, we must first "scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]" (*People v. Valladoli* (1996) 13 Cal.4th 590, 597.) The term "felonious criminal conduct" obviously has a different meaning than the term "criminal conviction." The first term describes an act and the second one describes a possible consequence of that act. If the Legislature had wanted to make a *conviction* for felonious conduct a prerequisite for street terrorism, it could have easily done so. In fact, it used the term "convicted of a felony" in describing the elements for the gang enhancement in Penal Code section 186.22, subdivision (b), indicating it was well aware of the distinction between criminal conduct and a criminal conviction.[1] The Legislature's failure to use similar language in the street terrorism statute indicates it did not intend to require a criminal conviction to prove a violation of that statute. (See *People v. Buycks* (2018) 5 Cal.5th 857, 880 [when the Legislature has used a term or phrase in one part of a statute and excluded it in another, it should not be implied where excluded].)

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[1] Penal Code section 186.22, subdivision (b) provides additional penalties for "any person who is convicted of a felony" that was committed for the benefit of a criminal street gang.

Appellant draws our attention to cases in which the defendant's conviction for street terrorism was reversed for lack of evidence he actually engaged in felonious conduct. (See, e.g., *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, disapproved on other grounds in *People v. Farwell* (2018) 5 Cal.5th 295, 304, fn. 6 [insufficient evidence to support underlying felony mandated reversal of street terrorism count]; see also *People v. Lamas* (2007) 42 Cal.4th 516 [elements of street terrorism statute not satisfied where the defendant's conduct only rose to the level of a misdemeanor].) However, appellant does not contend his street terrorism conviction must be reversed for lack of evidence he engaged in felonious conduct. Rather, he contends, it must be reversed because the jury failed to *convict* him of such conduct. As the case of *People v. Valenzuela* (2016) 5 Cal.App.5th 449 (*Valenzuela*), review granted Mar. 1, 2017, S239122, illustrates, this is an important distinction.

In *Valenzuela*, the defendant was convicted for felony theft and street terrorism. Following the passage of Proposition 47, he not only petitioned to have the theft conviction reduced to a misdemeanor, he argued such a reduction would mandate reversal of his street terrorism conviction for lack of a felony conviction. The *Valenzuela* court disagreed. While it had no reason to question the reduction of the defendant's theft conviction to a misdemeanor, it determined that reduction had no effect on his conviction for street terrorism because that conviction "did not require a felony conviction; it required only that [the defendant]'s conduct (which resulted in the grand theft conviction) was felonious at the time he engaged in it." (*Valenzuela, supra*, 5 Cal.App.5th at p. 452.)

In so ruling, the *Valenzuela* court emphasized: "'The gravamen of the [street terrorism offense] is active participation in a criminal street gang.' [Citation.] To that end, it requires participation in the 'felonious criminal conduct' of at least one other gang member. [Citations.] It does not require that anyone sustain a conviction for that conduct. Because the focus is on the commission rather than the conviction of a felony, it is irrelevant that [the defendant]'s theft conviction 'shall [now] be considered a

misdemeanor for all purposes.' [Citation.]" (*Valenzuela, supra*, 5 Cal.App.5th at p. 452.)

Although *Valenzuela* arose in a different procedural posture than our case, we agree with its core holding that the street terrorism statute turns on whether the defendant committed felonious criminal conduct, not whether he was convicted of it. This construction fully comports with the underlying purpose of the statute, which is to deter felonious activity by gang members. (See *People v. Rodriguez, supra*, 55 Cal.4th at p. 1139.)

The alleged felonious conduct in this case was murder and manslaughter. Following the verdict, after it declared a mistrial on the murder charge, the court asked the jury foreperson what the jury's last vote on that charge was, and the foreperson replied, "11 persons felt it was first degree. One person felt it was second degree." This shows the jury was convinced beyond a reasonable doubt that appellant had engaged in felonious criminal conduct; they simply couldn't agree on what particular type of felony he had committed. We do not believe the Legislature intended to prohibit a conviction for street terrorism under these circumstances.

Appellant contends it is immaterial how the jury was split because this information was not obtained until after the jury was dismissed. This is not true. When asked to inquire of this issue, the trial court initially said it would do so only after it had formally discharged the jury. However, as it turned out, the court did not actually discharge the jury until after the foreperson had already revealed how their last vote had gone.

In any event, we need not hang our hat on precisely when the jury's split became apparent. Because the evidence fully supports the jury's determination that appellant engaged in felonious criminal conduct, it is immaterial the jury did not convict him of murder or manslaughter or how it was divided. A conviction for one of those crimes was not required to find him guilty of street terrorism.

Nor was the jury required to unanimously agree on which particular felony formed the basis for appellant's street terrorism conviction. The purpose of the unanimity requirement is "'to prevent the jury from amalgamating evidence of *multiple offenses*, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, italics added.) Therefore, "where the evidence shows only a *single discrete crime* but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*Ibid*., italics added.)

In this case, appellant as charged with, and the evidence showed, but one single offense of street terrorism based on one single shooting episode. While the jury had to unanimously agree appellant *committed* that offense, they did not have to agree on *how* he committed it. Accordingly, they did not have to unanimously agree on which particular felony he committed by fatally shooting Ramirez. At any rate, the record indicates all of the jurors agreed appellant committed *at least* second degree murder, which is sufficient to satisfy the felonious conduct requirement.

Still, as we have explained, the prosecution was required to prove appellant acted with at least one other gang member. Gonzalez, who was with appellant in the Trailblazer before the shooting, was not a gang member, so he could not fulfill this requirement. But Munoz, like appellant, was an established OVC gang member at the time. Munoz pleaded guilty to voluntary manslaughter for his part in the shooting, and the record shows he arrived at the bar with appellant knowing appellant had a gun. After exchanging words with VML rival Ramirez during the initial altercation, Munoz said "fuck that . . . go get the strap" and briefly left the bar with appellant. Then, while appellant and Gonzalez were outside in his Trailblazer, Munoz watched Ramirez closely

inside the bar. He also called appellant before the shooting to tell him he would be leaving the bar soon and to have the Trailblazer ready to go. Shortly after the shooting, he spoke with appellant yet again by phone, and then he tried to hide his phone before eventually meeting up with appellant at Gonzalez's house.

Based on this evidence, the jury could reasonably conclude Munoz and appellant were working together, and that by shooting Ramirez, appellant committed felonious criminal conduct with another member of his gang. Because that theory enjoys substantial evidentiary support, we are powerless to disturb appellant's conviction for street terrorism. (See *People v. Bolin* (1998) 18 Cal.4th 297, 331 [an appellate court may not reverse a conviction for insufficient evidence unless it appears that upon no hypothesis whatsoever is there substantial evidence to support it].)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.